87-730 (1)
No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTINE MEYER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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87 PP

QUESTIONS PRESENTED

1. Whether a presumption of vindictiveness can attach to a prosecutor's decision to increase the charges against a defendant prior to trial.

2. Whether a district court may dismiss a charge that is untainted by any allegation of vindictiveness as the remedy for prosecutorial vindictiveness in connection with a separate charge.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Appellees in the court of appeals and respondents in this Court are Christine A. Meyer, Theresa Fitzgibbon, Norman C. Jimerson, Angela J. Keefe, Susan J. Blake, Jo Ellen Childers, Kitty Fives, Julie L. Sinai, Richard Spener, Lisa Tarver, Mindy Washington, Maria R. Conners, Jeanne Marie Walsh, Judith Hand, Robert G. Coleman, Margaret E. DeColigny, Wallie H. Mason, Edward R. Rauber, Mary S. Dailey, Virginia Senders, Joan E. Whitney, Judith Hearn, Teri K. Galvin, Cheryl L. Hughes, Margaret Arteago, Carol L. Bellin, Marguerite Toll, Renata E. Eustis, Martin G. Weiner, Dawn M. Cook, Marjorie N. Van Clief, Jacob Weinstein, Carol J. Chappell, Richard Deyo, Ann Marie Eisenberg, and Kevin Raymond Reilly.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-15a) is reported at 810 F.2d 1242. The opinions accompanying the vacatur of the order granting rehearing en banc and the denial of rehearing (App., *infra,* 16a-50a) are reported at 824 F.2d 1240. The bench ruling of the district court granting respondents' motion to dismiss the informations (App., *infra,* 51a-54a) is unreported. The opinion of the district court denying the government's motion for reconsideration (App., *infra,* 55a-57a) is reported at 664 F. Supp. 550.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 58a-59a) was entered on February 13, 1987. A petition for

rehearing was denied on July 31, 1987 (App., *infra*, 63a).[1] On September 22, 1987, the Chief Justice entered an order extending the time within which to file a petition for a writ of certiorari to and including October 29, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. On April 22, 1985, United States Park Service police officers issued citations to approximately 200 persons who were demonstrating outside the White House. Each citation alleged a violation of 36 C.F.R. 50.19 (1985), which makes it a misdemeanor to demonstrate on national park grounds without a permit. That offense carried a maximum penalty of six months' imprisonment and a $500 fine (36 C.F.R. 50.5(d) (1985)). Some of the demonstrators posted and forfeited $50 collateral in full satisfaction of the charge.[2] Others decided to contest their citations in court.

On the date of arraignment, the prosecutor filed two-count informations against most of the remaining demonstrators, including respondents. The informations charged each of the defendants with one count of demonstrating without a permit, in violation of 36 C.F.R.

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[1] The panel denied the government's petition for rehearing on April 30, 1987 (App., *infra*, 60a). On that date, however, the full court of appeals entered an order granting the government's suggestion for rehearing en banc (App., *infra*, 61a). By an order entered on July 31, 1987, the full court vacated its April 30, 1987, order and reinstated the judgment and panel opinion entered on February 13, 1987 (App., *infra*, 22a). On July 31, 1987, the panel entered an order again denying the government's petition for rehearing (App., *infra*, 63a).

[2] Pursuant to Local Rule 3-8(a)(16) (now Rule 505(d)) of the Rules of the United States District Court for the District of Columbia, the magistrates have prescribed $50 as the appropriate fine for disposing of the charge of demonstrating without a permit. That fine is paid by forfeiture of collateral, as permitted by Rule 4 of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates, 18 U.S.C. App. at 675.

50.19, and one count of obstructing sidewalks adjacent to the White House, in violation of 36 C.F.R. 50.30 (1985). The second count, like the first, carried a maximum penalty of six months' imprisonment and a $500 fine (36 C.F.R. 50.5(a) (1985)). Most of the defendants then entered pleas of not guilty to both counts of the informations. A small number, however, pleaded no contest to a single charge of demonstrating without a permit. They were sentenced to brief terms of unsupervised probation. The remaining count of obstructing the sidewalk was dismissed against those defendants. The defendants who entered pleas of not guilty were ordered to return for trial on September 11, 1985.

2. On that date, respondents moved to dismiss the informations on the ground of prosecutorial "vindictiveness," *i.e.*, that the government added the second misdemeanor charge to punish respondents for choosing to stand trial, rather than forfeiting collateral. At the outset of the district court's hearing on the motion, the prosecutor moved to dismiss the charge of obstructing the sidewalks in order to avoid the need for a jury trial. The district court granted the motion (9/11/85 Tr. 3). Respondents, however, contended that they were entitled to a dismissal of both charges against them because of the alleged vindictiveness of the prosecutor in bringing the second charge after they had insisted on a trial (*id.* at 14-38).

Respondents claimed that they had no notice that the prosecutor would add a new charge if they refused to plead guilty and went to trial. Respondents also alleged that they had not been informed that they could forfeit the $50 collateral and terminate the case at any time (9/11/85 Tr. 15, 17). Finally, respondents asserted that the prosecutor added the second misdemeanor charge simply to "coerc[e] or pressur[e] the defendants to enter guilty pleas or to pay the $50 fine[,] with the threat of prosecution and a year of prison behind that should they choose to exer-

cise their right to trial" (*id.* at 16-17). In response, the prosecutor contended that, under *United States* v. *Goodwin*, 457 U.S. 368 (1982), a prosecutor's pretrial decision to increase the charges against a defendant is not presumptively "vindictive" (9/11/85 Tr. 19-20). The prosecutor explained that the government added the second misdemeanor charge after a representative of the United States Attorney's office first examined the case, which occurred only after respondents had been arrested on the initial misdemeanor charge and had decided to stand trial (*id.* at 21).[3] Lastly, the prosecutor stated that "the offer for individuals to forfeit the $50 collateral remains open to today up to the beginning of trial and has remained open throughout" (*id.* at 21).

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[3] The prosecutor engaged in the following colloquy with the district court (9/11/85 Tr. 20-21):

> MR. MC DANIEL [the prosecutor]: Your Honor, I would suggest because of the vast number of arrests and the amount of paper work that had to be processed—
>
> THE COURT: If what you say is true, then there would be different charges against different individuals arising out of the additional information.
>
> MR. MC DANIEL: Perhaps, your Honor.
>
> THE COURT: You knew everything except the details of what the officer would testify to and the confirmation of the alleged misconduct was known at the time that they were given the ticket.
>
> MR. MC DANIEL: The facts were known, your Honor.
>
> THE COURT: Certainly they were known.
>
> MR. MC DANIEL: The recognition of which legal theory the govenment wished to proceed on was a different matter. That is something that required a certain amount of contemplation and analysis by members of the United States Attorney's Office and that was motivated, I would suggest, solely by a balancing of the societal interests in controlling unruly demonstrations and the relative gravity of this particular offense given its effect upon the community.

The district court granted the motion to dismiss, ruling that the government's decision to add a second charge was vindictive because it was made without giving respondents any notice (App., *infra,* 51a-54a). As the district court put it, "to this Court it's a clear indication that in the exercise of your right to have a jury trial, the government upped the ante, as far as the government is concerned, with no notice, no consultation, with no opportunity for you to make an election" (*id.* at 54a). The district court reiterated that conclusion in a later order denying the government's motion for reconsideration (*id.* at 55a-57a).

3. The government appealed the district court's ruling, and the court of appeals affirmed (App., *infra,* 1a-15a). The court declined to decide whether the prosecutor who filed the second misdemeanor charge against respondents was actually motivated by vindictiveness (*id.* at 6a). Instead, the court concluded that a presumption of vindictiveness was justified, for several reasons (*id.* at 7a-14a).

First, the court found that "the most important" factor justifying a presumption of vindictiveness was that the government treated differently those demonstrators who chose to forfeit collateral and those who chose to stand trial, since only persons in the latter group were charged with two misdemeanors (App., *infra,* 8a). Second, the court stated that the simplicity of the facts underlying the charges and the complexity of the legal argun ents that respondents could assert in their defense justified a presumption that the prosecutor had increased the charges solely because respondents elected to stand trial (*id.* at 9a). Third, the prosecutor's decision to drop the second charge against respondents once they chose to stand trial manifested, in the court of appeals' view, "a disturbing willingness to toy with the defendants" (*id.* at 10a). Finally, the court concluded that the prosecutor had a motive for acting vindictively. Because many of the demonstrators had expressed an intention to contest the

charges on First Amendment grounds, the court stated, "[t]he government had a strong incentive to try to keep clear of this courtroom morass" and "to avoid the annoyance and expense of prosecuting these minor cases at a potentially drawn-out trial" (*ibid.*). The court therefore concluded that it was appropriate to presume that the prosecutor had acted vindictively and to shift to him the burden of going forward to show that his conduct was not the product of vindictiveness. Because the government made no attempt, in the court's view, to rebut the presumption of vindictiveness, the court upheld the district court's conclusion that the government had acted vindictively (*id.* at 10a-13a).

The court of appeals also upheld the district court's remedy – dismissal of the original misdemeanor charge – even though the original charge was untainted by any allegation of prosecutorial vindictiveness (App., *infra*, 13a-15a). The court held that a district court may dismiss an untainted charge in order to deter prosecutors from acting vindictively in the future (*id.* at 14a).

4. The court of appeals granted the government's suggestion for rehearing en banc, but the court later vacated that order and reinstated the panel opinion (App., *infra*, 22a). Five judges dissented from the order vacating the decision to rehear the case en banc (*id.* at 41a-48a (opinion of Bork, J.)).

REASONS FOR GRANTING THE PETITION

Because it affects the traditional independence of the prosecutor to select charges and decide what plea dispositions to accept, the doctrine of vindictive prosecution has been restricted to cases in which there has been a compelling need for judicial intervention. By applying a presumption of vindictiveness to a prosecutor's pretrial charging decision, the court of appeals has extended the doctrine of vindictive prosecution well beyond the limits established

by this Court. The court of appeals' decision is contrary to this Court's precedents in three respects.

First, the court of appeals' holding that the prosecutor's action was presumptively invalid cannot be reconciled with this Court's 1982 decision in *United States* v. *Goodwin,* 457 U.S. 368, in which the Court refused to adopt any such presumption in the context of a pretrial increase in charges. *Second,* by ignoring the fact that respondents were free to forfeit $50 collateral on the original misdemeanor charge and thereby end the case, the court of appeals failed even to consider this Court's decisions that a prosecutor does not act vindictively when he does no more than present a defendant with the alternatives of pleading guilty to a lesser offense or standing trial on an enhanced charge. *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978); *Corbitt* v. *New Jersey,* 439 U.S. 212 (1978). *Third,* by upholding the dismissal of the original, untainted misdemeanor charge solely to deter other prosecutors from acting vindictively, the court of appeals confused the question whether the prosecutor was culpable with the question whether respondents were prejudiced by the prosecutor's actions. The court of appeals thus endorsed a sanction that conflicts with the one this Court has approved for cases of prosecutorial vindictiveness (*Blackledge* v. *Perry,* 417 U.S. 21, 31 n.8 (1974)) and that is inconsistent with "the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests" (*United States* v. *Morrison,* 449 U.S. 361, 364 (1981)).

1. a. In *United States* v. *Goodwin, supra,* the defendant was charged by a police officer with several misdemeanors and petty offenses, and the case was initially handled by a prosecutor with limited authority. Plea negotiations broke down, and the defendant demanded a jury trial. The case was then transferred to another prosecutor, who added a felony charge after reviewing the case.

The court of appeals believed that this series of events justified a presumption that the new charge was added to punish the defendant for exercising his right to a jury trial. This Court reversed. The court rejected the claim that a prosecutor's decision to increase charges against a defendant before trial is presumptively unlawful even if the defendant demands a jury trial. 457 U.S. at 380-384. Thus, "the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified" (*id.* at 382-383). That is true, the Court explained, because "[t]he possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness is certainly not warranted" (*id.* at 384 (emphasis in original)). In that setting, the Court held, the defendant may obtain relief only by proving actual vindictiveness, *i.e.*, "that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do" (*id.* at 384).

This Court has recently reaffirmed the principle of *Goodwin*, that a prosecutor's decision to increase the charges against a defendant is presumptively valid even if the increase comes after the defendant has exercised some legal right. See *Thigpen* v. *Roberts*, 468 U.S. 27, 30 n.4 (1984) (the "presumption [of vindictiveness] does not apply when charges are enhanced following a pretrial demand for a jury trial"); *Wasman* v. *United States*, 468 U.S. 559, 568 (1984) (plurality opinion). Other courts of appeals that have addressed the issue since *Goodwin* have likewise found the presumption of vindictiveness inapplicable to pretrial charging decisions. See *United States* v. *Oliver*, 787 F.2d 124, 126 n.1 (3d Cir. 1986); *United States* v. *Martinez*, 785 F.2d 663, 668-669 (9th Cir. 1986); *United States* v. *Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. 1982).

The court of appeals disregarded this principle. According to the court of appeals, the Court in *Goodwin* did not mean to hold that the presumption of vindictiveness is generally inapplicable in the pretrial setting, but only that it is inapplicable to cases identical to *Goodwin*. Slight changes in the circumstances, the court of appeals held, can require the invocation of the presumption even in the pretrial context (App., *infra,* 8a-10a; *id.* at 30a (opinion of Mikva, J.)).

That proposition finds no support in the *Goodwin* decision. *Goodwin* did not suggest that the applicability of the presumption of vindictiveness turns on the precise facts of each case. On the contrary, because of the circumstances common to the pretrial stage of all cases, the Court in *Goodwin* concluded that the presumption of vindictiveness should not be applied in the pretrial stage at all. See 457 U.S. at 381-384.

b. In any event, the distinctions drawn by the court of appeals between this case and *Goodwin* are not persuasive, and do not justify finding the prosecutor's charging decision in this case to be vindictive. The "most important" reason for invoking the presumption of vindictiveness, according to the court of appeals, was that the government treated the demonstrators who decided to stand trial differently from those who forfeited the $50 collateral (App., *infra,* 8a). Yet that difference in treatment was due to the fact that the other demonstrators forfeited collateral or pleaded no contest pursuant to a form of plea bargaining codified by rule of court. That difference is an inevitable (and permissible) result of plea bargaining and raises no due process issue. In *Corbitt* v. *New Jersey,* 439 U.S. at 223-224, this Court held that a variance in the penalties received by different defendants does not give rise to a presumption that one who receives a more severe punishment has been a victim of retaliation when the difference stems from plea bargaining. The proposition embraced by the

court of appeals is not significantly different from the one this Court rejected in *Corbitt*.

The court of appeals also found (App., *infra*, 9a) that "[t]he simplicity and clarity of both the facts and law" relevant to the case gave rise to a suspicion that the prosecutor added the new misdemeanor charge for the purpose of retaliation. That conclusion ignores the fact that no prosecutor had undertaken any legal analysis of the case until respondents declined to forfeit collateral and their cases were referred to the United States Attorney. *Goodwin* refused to bind the government to the charging decision made by a lawyer who lacked authority to indict or try a felony prosecution. It necessarily follows that the government should not be bound by the charging decision made by an arresting police officer.[4]

The court of appeals also emphasized the fact that the prosecutor sought to dismiss the additional misdemeanor charge once the district court concluded that respondents were entitled to a jury trial, believing that the prosecutor's action evidenced "a disturbing willingness to toy with the defendants" (App., *infra*, 10a). Yet there is nothing improper in a prosecutor's judgment that a case is not sufficiently serious to warrant the additional commitment of resources necessary for a jury trial. That judgment, made every day by prosecutors, is a proper exercise of prosecutorial discretion. The decision to dismiss a count rather than needlessly to spend additional resources hardly sup-

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[4] There is also no basis for the court of appeals' supposition that the prosecutor who initially examined this case had an "institutional" desire to punish respondents for exercising their rights (App., *infra*, 11a). No facts are cited to support that assertion, and the only decision cited by the court of appeals, *Thigpen* v. *Roberts*, *supra*, did not involve a prosecutor's pretrial decision to increase the charges against a defendant. The *Thigpen* case, like *Blackledge* v. *Perry*, *supra*, involved a prosecutor's decision to increase charges against a defendant who sought a trial de novo after he had been convicted.

ports a finding that the earlier decision to add the charge was retaliatory.

2. The court of appeals' decision was wrong for a second reason as well. Even after the prosecutor added the second charge, each respondent had the opportunity to forfeit the $50 collateral in full satisfaction of the charges and thereby avoid any risk of suffering a more severe penalty following a trial. The prosecutor made clear during the hearing on respondents' motion to dismiss that each respondent could forfeit collateral, as was noted on the original citations, and end the case (9/11/85 Tr. 21).[5] Thus, even if respondents were correct that the prosecutor added the second misdemeanor charge to "coerc[e] or pressur[e]" them to forfeit collateral rather than to stand trial (*id.* at 16-17), respondents would be entitled to no relief. The Court's decision in *Bordenkircher* v. *Hayes, supra,* makes clear that a prosecutor does not act unlawfully if he brings additional charges against a defendant to encourage him to plead guilty to a lesser offense.[6]

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[5] At the hearing on respondents' motion, the parties disputed whether the prosecutor had renewed the offer to appellees to forfeit the $50 collateral in satisfaction of the charges before the hearing began. There is no dispute, however, that the prosecutor stated at the hearing that respondents had that option. It is therefore clear that, regardless of what transpired before the hearing began, respondents at that point had a choice between pleading guilty and incurring a lesser penalty, or going to trial and facing a more severe penalty (albeit only on the original misdemeanor charge).

[6] *Bordenkircher* held that due process does not prohibit a prosecutor from carrying out a threat made during plea negotiations to bring additional charges against the accused if he refuses to plead guilty to the original charge and demands a trial. 434 U.S. at 363-365. The Court explained that, by approving and encouraging the practice of plea bargaining, it had endorsed as legitimate a prosecutor's decision to exercise charging discretion in order to encourage a defendant to plead guilty. *Id.* at 363. See *Goodwin,* 457 U.S. at 378 (cases preceding *Bordenkircher* involving plea bargaining had "accepted as constitutionally legitimate the simple reality that the prosecutor's interest at

Accordingly, neither the reason underlying the prosecutor's exercise of charging discretion, nor the fact that he "openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution," violated due process. *Bordenkircher,* 434 U.S. at 364-365; see also *Goodwin,* 457 U.S. at 378-379 & n.10. Once again, every other court of appeals that has addressed the issue has found it lawful for the prosecution to employ such pressures as part of the give and take of plea bargaining. *People of the Territory of Guam* v. *Fegurgur,* 800 F.2d 1470, 1473 (9th Cir. 1986), cert. denied, No. 86-1194 (Mar. 23, 1987); *United States* v. *Oliver,* 787 F.2d 124 (3d Cir. 1986); *Luna* v. *Black,* 772 F.2d 448 (8th Cir. 1985); *United States* v. *Cole,* 755 F.2d 748 (11th Cir. 1985).[7]

3. The court of appeals also was fundamentally wrong in upholding the dismissal of the original misdemeanor

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the bargaining table is to persuade the defendant to forgo his constitutional right to stand trial"). There is also no material difference, the Court held, between a prosecutor's decision to dismiss the charges originally brought against the defendant in exchange for his entry of a guilty plea, and a prosecutor's decision to add new charges against the defendant if plea negotiations fell apart. *Bordenkircher,* 434 U.S. at 360-361, 365.

[7] In its effort to distinguish *Goodwin,* the court of appeals asserted that the prosecutor had a motive for acting vindictively: he might have added the second misdemeanor charge to convince respondents to abandon their First Amendment challenges to this prosecution and to deter other demonstrators from raising similar claims (App., *infra,* 10a). But increasing the charges against a defendant to induce him to plead guilty rather than to stand trial is precisely what *Bordenkircher* permits a prosecutor to do. The fact that the effect of a guilty plea would be that respondents would abandon their First Amendment claims does not render *Bordenkircher* any less applicable. It is therefore irrelevant whether that motivation played any part in the prosecutor's decision.

charge lodged by the Park Police, a charge that was untainted by any allegation of vindictiveness. The court of appeals reasoned that there must be some penalty for the improper addition of a charge, and that the trial judge had the discretion to dismiss the original charge in order to deter such conduct by other government lawyers. The fact that respondents could claim no illegality in the original charge, or any prejudice in defending against it traceable to the misconduct, the court held, was inconsequential.

That ruling was plainly in error. "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith* v. *Phillips,* 455 U.S. 209, 219 (1982). As Judge Bork explained below (App., *infra,* 47a-48a), there is no valid reason that respondents should be given immunity on valid charges because of misconduct by the prosecutor concerning another charge that did not impair their defense to the original misdemeanor count. This Court made clear in *United States* v. *Morrison,* 449 U.S. at 365 (footnote omitted), that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." As the Court explained (*id.* at 364), "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Cf. *United States* v. *Payner,* 447 U.S. 727 (1980) (district courts lack supervisory power to suppress evidence tainted by illegality that did not violate a defendant's constitutional rights); *United States* v. *Mitchell,* 322 U.S. 65, 70-71 (1944) (courts' inherent power to "shap[e] rules of evidence relates to the propriety of admitting evidence" and "is not to be used as an indirect mode of disciplining misconduct").

In addition to being inconsistent with the principles of *Morrison,* the court of appeals' ruling conflicts with this Court's decision in *Blackledge* v. *Perry, supra.* In *Blackledge,* this Court made clear that the presumption of vindictiveness adopted in that case would not provide a defendant with immunity from prosecution, as the dissent feared (417 U.S. at 39 (Rehnquist, J., dissenting)). "Contrary to the dissenting opinion, our decision today does not 'assure that no penalty will be imposed' on respondent. * * * While the Due Process Clause * * * bars trial of Perry on the felony assault charges in the Superior Court, North Carolina is wholly free to conduct a trial *de novo* in the Superior Court on the original misdemeanor assault charge." *Id.* at 31 n.8. The Ninth and Sixth Circuit subsequently followed *Blackledge* on that point, and the decisions of those courts therefore also conflict with the decision of the court of appeals in this case.

In *United States* v. *Hollywood Motor Car Co.,* 646 F.2d 384 (9th Cir. 1981), rev'd on other grounds, 458 U.S. 263 (1982), the defendant advanced the same argument that the court of appeals accepted in this case: that all of the counts in an indictment, tainted and untainted alike, must be dismissed once the government has acted vindictively, since allowing the government to proceed on the original charges would undermine the deterrent effect of the prohibition against prosecutorial vindictiveness. The Ninth Circuit disagreed. Relying on this Court's decision in *United States* v. *Morrison, supra,* the Ninth Circuit ruled that the government could go forward on the original, untainted counts because the defendant had not established "a pattern of recurring violations" necessary before a court could consider whether to dismiss an indictment. *Hollywood Motor Car,* 646 F.2d at 389. Similarly, in *United States* v. *Andrews,* 633 F.2d 449 (1980) (en banc), cert. denied, 450 U.S. 927 (1981), the Sixth Circuit ruled that "the ordinary remedy" for prosecutorial vindictive-

ness "is to bar the augmented charge." 633 F.2d at 455. The decision below is flatly inconsistent with the approach endorsed in *Blackledge*, *Hollywood Motor Car*, and *Andrews*, and for that reason as well, it warrants review by this Court.

4. In addition to being inconsistent with this Court's precedents on the subject of vindictive prosecution and the decisions of other courts of appeals that have applied those precedents, the decision of the court of appeals in this case may significantly hamper the functioning of the magistrates' citation system in cases involving mass demonstrations in the District of Columbia (see App., *infra*, 42a, 48a (opinion of Bork, J.)). The only evidence that respondents adduced to support their due process claim was that some protestors chose to forfeit collateral on a charge listed by an arresting officer, that the cases of other demonstrators who chose to stand trial were forwarded to a prosecutor for his review, and that, after reviewing the case, the prosecutor brought an additional misdemeanor charge against respondents. In *Goodwin*, this Court put to rest the notion that this sequence of events gives rise to a presumption of vindictiveness. Nonetheless, the court of appeals ruled that the events of this case—a scenario that is likely to be repeated in other mass protests in the District of Columbia—dictated a presumption that the prosecutor was vindictively motivated. Unless the court of appeals subsequently treats this decision as nothing more than "a restricted railroad ticket, good for this day and train only" (*Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)), the court's ruling will disrupt the government's ability expeditiously to handle the type of mass demonstrations that are a commonplace in the District of Columbia.[8]

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[8] The court of appeals offered three reasons why its holding may not bind prosecutors in the District of Columbia to all charging decisions of arresting officers, but none of those reasons stands up under

That result would be unfortunate for both the government and defendants. Prosecutors must be able to reassess charging decisions made by the police since "[a] policeman on the scene cannot be expected to assay the evidence with the technical precision of a prosecutor drawing an information." *Washington Mobilization Committee* v. *Cullinane,* 566 F.2d 107, 123 (D.C. Cir. 1977). In addition, the fact that some defendants select a summary disposition of charges does not mean that a prosecutor must treat every other defendant in the same way. *Newman* v. *United States,* 382 F.2d 479, 481-482 (D.C. Cir. 1967) ("Two persons may have committed what is precisely the same legal offense[,] but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges."). The alternatives to the present system are also burdensome. The government could forgo use of the

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analysis. First, the court of appeals stated that "such a holding is limited to the precise circumstances of this case; in other cases, with different facts, the presumption may not lie" (App., *infra,* 12a). That prediction is unconvincing. The circumstances to which the court of appeals attached significance are likely to be present in virtually every case involving arrests during demonstrations in the District of Columbia.

Second, the court of appeals said that the government can always rebut the presumption of vindictiveness (App., *infra,* 12a). That suggestion is, of course, no justification for adopting an erroneous presumption to begin with. Moreover, the court of appeals' suggestion is more fiction than fact, since the prosecutor offered a legitimate explanation for the second charge (9/11/85 Tr. 21; page 4 note 3, *supra*), and the court of appeals ignored it.

Finally, relying on *Bordenkircher,* the court of appeals suggested "the possibility" (the court went no further) that the government could note on citation forms that a person will expose himself to enhanced charges if he decides to stand trial (App., *infra,* 12a-13a). It is hard to believe that the court of appeals, having found that it was improper for the prosecutor to increase the charges against respondents after they requested a jury trial, would allow a prosecutor to strike "foul" blows (*Berger* v. *United States,* 295 U.S. 78, 88 (1935)) as long as they are telegraphed in advance.

magistrates' citation system, or at least preclude anyone from forfeiting collateral until a prosecutor has reviewed the charges. Obviously, any such procedure would be cumbersome and costly. Permitting petty offenders to dispose of their charges expeditiously by forfeiture of collateral, without prosecutorial review, is a valuable, cost-effective procedure. Moreover, allowing a defendant to terminate a case by immediately forfeiting collateral is advantageous from his perspective, since it permits him to dispose of the charges quickly, without awaiting prosecutorial review and without risking a possible jail sentence.[9] Accordingly, the procedures for forfeiting collateral should not be encumbered by requiring or encouraging preview of the charges by prosecutors, which is a necessary result of the court of appeals' ruling. The degree to which that ruling undercuts the utility of a system as beneficial as the system of magistrate citations is powerful evidence that the court of appeals' decision is untenable in the first place.

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[9] Cf. *United States* v. *Mills*, 472 F.2d 1231, 1239-1241 (D.C. Cir. 1972) (en banc), in which the court of appeals held that the opportunity to post collateral was such a crucial procedural right that a search ancillary to booking, which was conducted without first advising the defendant of his right to post collateral and leave the stationhouse, violated the Fourth Amendment. Accord *United States* v. *Robinson*, 471 F.2d 1082, 1101-1103 (D.C. Cir. 1972) (en banc), rev'd on other grounds, 414 U.S. 218 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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OCTOBER 1987

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE MEYER, ET AL.

No. 85-6171

UNITED STATES OF AMERICA, APPELLANT

v.

THERESA FITZGIBBON, ET AL.

No. 85-6172

UNITED STATES OF AMERICA, APPELLANT

v.

VIRGINIA SENDERS, ET AL.

Appeals from the United States District Court
for the District of Columbia
(Criminal Nos. 85-00329-01, 85-00330-01
and 85-00331-01)

Argued September 11, 1986

Decided February 13, 1987

Before: WALD, *Chief Judge*, MIKVA, *Circuit Judge*, and LEIGHTON,* *Senior District Judge*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: In this case, we review a district court's decision to dismiss several informations on the ground of prosecutorial vindictiveness. The government contends that the district court's finding of vindictiveness is wrong as a matter of law and perilous as a matter of policy. The government further contends that even if vindictive prosecution occurred, the remedy that the district court imposed is unwarranted. We decline to accept these claims. According proper deference to the lower court, we affirm its order to dismiss.

I. BACKGROUND

On April 22, 1985, officers of the United States Park Police arrested approximately 200 political demonstrators outside of the White House. The officers gave each demonstrator a U.S. Park Police Citation Form, issued pursuant to the District of Columbia's "magistrates" citation system." Each form charged the recipient with "demonstrating without a permit" in violation of 36 C.F.R. § 50.19 and described two options for disposing of the charge. According to the form, the arrestee could either forfeit $50 in full satisfaction of the charge or proceed to trial. The maximum penalty on the specified charge was a $500 fine and six months' incarceration.

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*Of the United States District Court for the Northern District of Illinois, sitting by designation pursuant to 28 U.S.C. § 294(d).

Although most of the demonstrators chose to forfeit $50, some elected to proceed to trial. At their arraignments, which took place on May 29, June 21, and June 28, 1985, these persons learned that they would have to defend themselves against a further charge. The government had filed two-count informations against the demonstrators who had chosen to exercise their right to trial. Count II of the informations contained the original charge of demonstrating without a permit. Count I contained an additional charge of obstructing the sidewalks adjacent to the White House in violation of 36 C.F.R. § 50.30, which also carries a maximum penalty of six months' imprisonment and a $500 fine. The government extended a plea offer to some of the defendants, under which the government would dismiss Count I of the information and recommend a sentence of six months' unsupervised probation on Count II if the defendant pleaded no contest to the latter count. A number of the defendants accepted this plea arrangement, but 36 chose to go to trial.

On July 30, 1985, counsel for the defendants moved to dismiss the informations on the ground of vindictive prosecution. Counsel also requested a jury trial, noting that the addition of a second charge and the enhanced potential sentence had triggered the defendants' jury trial right. The district court granted the motion for a jury trial and found the defendants' counsel had raised sufficient question concerning prosecutorial vindictiveness to warrant a separate hearing on the issue.

At the hearing on vindictiveness, which occurred on September 11, 1985, the prosecutor immediately moved to dismiss Count I (the added count) of each of the informations. Counsel for the defendants objected, claiming that the sole purpose of the motion was to deprive the defendants of their right to a jury trial. The district court, however, granted the prosecutor's motion to dismiss the

added count. The court then heard argument on the defendants' motion to dismiss the informations (which now contained only the original count) on the ground of prosecutorial vindictiveness. The court found that the prosecutor had added a count to the informations solely because the defendants had exercised their right to trial and that such a course of action constituted vindictive prosecution. The court chose to remedy this prosecutorial misconduct by dismissing the informations. After the court denied the government's motion for reconsideration, *see* Joint Appendix at 99-102, the government filed this appeal.

II. Discussion

Our first task is to determine the appropriate standard of review in a vindictive prosecution case. Although this court has never faced the question, we find the matter fairly easy to resolve. An appellate court must use the clearly erroneous standard to review a trial court's finding of vindictive prosecution. The clearly erroneous standard ordinarily governs review of a judge's findings in a criminal case on issues other than the defendant's guilt, *see Campbell v. United States*, 373 U.S. 487, 493 (1963); *Jackson v. United States*, 353 F.2d 862, 864-65 (D.C. Cir. 1965); the standard governs review not only when the judge's findings are purely factual, but also when they involve mixed questions of law and fact, *see United States v. Hart*, 546 F.2d 798, 801-02 (9th Cir. 1976) (en banc). We can perceive no reason for departing from this general rule in cases of vindictive prosecution, *accord United States v. Spiesz*, 689 F.2d 1326, 1329 (9th Cir. 1982); an appellate court may overturn a judge's finding of vindictiveness only when a review of all of the evidence leaves the court "with the definite and firm conviction that a mistake has been committed," *see United States v. United States Gypsum*

Co., 333 U.S. 364, 395 (1948) (defining the clearly erroneous standard). A lower court's decision to dismiss an information or indictment, once a finding of vindictive prosecution has been appropriately made, is subject to a different standard of review. The choice of remedy for governmental misconduct rests within the sound discretion of the lower court; an appellate court may reverse an order remedying such misconduct only if the order constitutes an abuse of discretion. *See United States v. Artuso*, 618 F.2d 192, 196 (2d Cir.), *cert. denied*, 449 U.S. 861. Thus, in reviewing the district court's order to dismiss the informations on the ground of prosecutorial vindictiveness, we must ask a pair of questions: first, whether the finding of vindictiveness is clearly erroneous; and second, if the finding is not clearly erroneous, whether the decision to dismiss the information constitutes an abuse of the trial court's discretion.

A. ***The Finding***

"Prosecutorial vindictiveness" is a term of art with a precise and limited meaning. The term refers to a situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. *See United States v. Goodwin*, 457 U.S. 368, 372 (1982). In other words, a prosecutorial action is "vindictive" only if designed to penalize a defendant for invoking legally protected rights.

The Supreme Court has established two ways in which a defendant may demonstrate prosecutorial vindictiveness. First, a defendant may show "actual vindictiveness"—that is, he may prove through objective evidence that a prosecutor acted in order to punish him for standing on his legal rights. *See id.* at 380-81, 384 & n.19. This showing is, of course, exceedingly difficult to make. Second, a defendant may in certain circumstances rely on a presumption of vindictiveness: when the facts indicate "a realistic likelihood

of 'vindictiveness[,]' " a presumption will arise obliging the government to come forward with objective evidence justifying the prosecutorial action. *See Blackledge v. Perry*, 417 U.S. 21, 27-29, 29 n.7 (1974). If the government produces such evidence, the defendant's only hope is to prove that the justification is pretextual and that actual vindictiveness has occurred. But if the government fails to present such evidence, the presumption stands and the court must find that the prosecutor acted vindictively.

The district court in this case held that the defendants had shown actual vindictiveness, but we decline to reach this question. We uphold the ultimate finding—that prosecutorial vindictiveness entered into this case—as not clearly erroneous because we believe that the defendants presented evidence that would allow a court at least to find that a presumption of vindictiveness applied. The government declined to come forward with any evidence that would erase such a presumption and thus doomed itself to the critical finding.

The government contends that a presumption of prosecutorial vindictiveness can never apply in a pretrial setting and rests this claim on the Supreme Court's opinion in *United States v. Goodwin*. A magistrate had arraigned Goodwin on several misdemeanor charges, and an attorney from the Department of Justice, who had authority to try only petty crime and misdemeanor cases, took over the case. Plea negotiations ensued, but proved fruitless, and Goodwin asserted this right to a jury trial. Subsequently, an Assistant U.S. Attorney assumed responsibility for the case, and he proceeded to indict Goodwin on more serious charges. *See Goodwin*, 457 U.S. at 370-71. Goodwin argued that the facts supported a presumption of vindictive prosecution, but the Supreme Court disagreed. The Court had previously held that post-trial prosecutorial decisions to file increased charges automatically give rise to a presumption of vindictiveness.

See Blackledge, 417 U.S. at 27-29. The Supreme Court held in *Goodwin* that this prior ruling did not control because the prosecutor had entered increased charges against Goodwin prior to trial. *See Goodwin*, 457 U.S. at 381. The government appears to draw from this option the broad principle that a presumption of vindictiveness can never apply in a pretrial context. *See* Brief for Appellant at 18.

We find the government's reading of *Goodwin* unpersuasive. The Supreme Court in *Goodwin* declined to adopt a *per se* rule applicable in the pretrial context that a presumption will lie whenever the prosecutor "ups the ante" following a defendant's exercise of a legal right. *See Goodwin*, 457 U.S. at 381 ("There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting."). But the Court also declined to adopt a *per se* rule that in the pretial context no presumption of vindictiveness will ever lie. The lesson of *Goodwin* is that proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not alone give rise to a presumption in the pretrial context. The rationale supporting the Court's teaching is that this sequence of events, taken by itself, does not present a "realistic likelihood of vindictiveness." *See id.* at 381-84. But when additional facts combine with this sequence of events to create such a realistic likelihood, a presumption will lie in the pretrial context. Several post-*Goodwin* courts have adopted this view. They have recognized, as we do today, that a presumption of vindictiveness will lie in the pretrial setting if the defendant presents facts sufficient to show a realistic likelihood of vindictiveness. *See United States v. Krezdorn* 718 F.2d 1360, 1364-65 (5th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168-69 (9th Cir. 1982). The critical question in this case, as in all others, is whether the defendants have presented

such facts—whether the defendants have shown that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a presumption. We answer this question in the case at bar by holding that the defendants have made a showing sufficient to preclude us from reversing the lower court.

We begin by noting a set of predicate facts that *Goodwin* and the case at bar have in common. In both cases, of course, the prosecutor increased the charges against the defendants after the defendants had asserted their constitutional rights. In neither case did the defendants have any notice of this possibility: at no time had the prosecutors informed the defendants that they might face increased charges if they chose to go to trial. Finally, in neither *Goodwin* nor the case at bar had the defendants' own conduct after the initial charging decision given the government a legitimate reason to enhance the charges. These circumstances alone, of course, fail to support a realistic likelihood of prosecutorial vindictiveness; the Supreme Court's decision in *Goodwin* held as much. We note them because they combine with other circumstances in the case to suggest a retaliatory motivation.

Perhaps the most important of the circumstances peculiar to this case is the government's disparate treatment of the defendants who elected to go to trial and the defendants who elected to forego their trial rights. All of the defendants participated in the same demonstration and conducted themselves in the same manner. Yet the defendants who chose to go to trial faced two charges, whereas the other defendants confronted only one. This disparate treatment must give rise to a suspicion that the government discriminated among the defendants on the basis of their divergent decisions whether to exercise their right to trial. The facts in this case thus support, far more than did the facts in *Goodwin*, a finding of a realistic likelihood of prosecutorial vindictiveness.

The simplicity and clarity of both the facts and law underlying these prosecutions heightens the suspicions of prosecutorial vindictiveness. Governmental officials often make their initial charging decisions prior to gaining full knowledge or appreciation of the facts involved in a given case. In addition, officials often make charging decisions before analyzing thoroughly a case's legal complexities. The decision in *Goodwin* stemmed largely from the Supreme Court's understanding of these facts: the *Goodwin* Court recognized the frequency with which prosecutors must act on (and later compensate for) incomplete information or understanding. *See Goodwin*, 457 U.S. at 381. But the case at bar appears to present few problems of this kind; not even the government contests the simplicity and straightforwardness of either the conduct involved in this case or the law relating to that conduct. Thus, the suspicion must grow that the prosecutor increased the charges not because of any further factual investigation or legal analysis, but because the defendants chose to exercise their constitutional right to trial.

The government's conduct *after* levelling the increased charges against the defendants also lends support to a finding of a realistic likelihood of vindictiveness. At the very beginning of the hearing on prosecutorial vindictiveness, the government moved to drop the charge that it had so recently added to each information. Perhaps the government official responsible for the prosecutions acted in good faith; perhaps he merely changed his mind a second time. But when we look at the government's action in the context of the entire case, we find this possibility difficult to accept. The remaining defendants certainly had good reason to think that the government dropped the additional charges in order to avoid the necessity of a *jury* trial, which the district court had granted to the defendants on the basis of the enhanced charges. We find in this

prosecutorial action, viewed in context, a disturbing willingness to toy with the defendants, and we think that a lower court may take this kind of willingnesss into account in determining whether a presumption of vindictiveness will lie.

Finally, we take into consideration the government's motivation to act vindictively in this case. The *Goodwin* Court expressed doubt that in the run-of-the-mill pre-trial situation, the prosecutor would have any reason to engage in vindictive behavior; the Court noted that defendants routinely assert procedural rights prior to trial and that prosecutors are unlikely to respond vindictively to this everyday practice. *See id.* at 381. But the prosecutor in this case confronted something other than routine invocations of procedural rights on the part of individual defendants. In this case, a large group of defendants threatened to go to trial on what the government considered "petty offenses." *See* Brief for Appellant at 3 n.3. Many of these defendants had indicated their intention to proceed *pro se*. Many had determined to raise first amendment claims during the course of the trial. The government had a strong incentive to try to keep clear of this courtroom morass: it wished to avoid the annoyance and expense of prosecuting these minor cases at a potentially drawn-out trial. The Supreme Court previously had recognized that the government's interest in discouraging unexpected and burdensome assertions of legal rights may rise to a level that supports use of a presumption of vindictiveness. *See Blackledge*, 417 U.S. at 27. Although this governmental interest rarely rises to such a level in the pretrial context, *see Goodwin*, 457 U.S. at 381, we view the governmental stake in the instant case as sufficiently signficant to count toward use of the presumption.

The government asserts that assuming *arguendo* a presumption of vindictiveness can arise in a pretrial context, the various factors we have mentioned fail to support

use of a presumption in the case at bar. Essentially, the government contends that no presumption will lie because the "routine and benign procedures necessitated by the magistrates' citation system" explain the increased charges. *See* Brief for Appellant at 23. According to the government, the prosecutor only sees the case once the defendant has decided to go to trial; thus, any decision he makes to increase charges occurs in the course of routine prosecutorial review and in no way indicates vindictiveness. *See id.* at 21-24.

We reject this argument. The Supreme Court's decisions concerning vindictive prosecution have focused on the conduct of the government as a whole, rather than on the conduct or retributive sentiments of a single prosecutor. In *Thigpen v. Roberts*, 468 U.S. 27 (1984), for example, the Supreme Court states that a presumption of vindictiveness "does not hinge on the continued involvement of a particular individual. A district attorney burdened with the retrial might be no less vindictive because he did not bring the initial prosecution. Indeed, *Blackledge* referred frequently to actions by 'the State,' rather than 'the prosecutor.' " *Id.* at 31 (citation omitted). Thus, the government cannot defeat the defendants' argument that a presumption should arise in this case merely by pointing out that two different individuals made the charging decisions. Neither can the government defeat the defendants' argument by noting that the first charging official was not a government attorney. The magistrates' citation system makes the police officer no less than the prosecutor a member of the prosecution team. We view their actions in conjunction, and we view the process of which they are a part as a whole. To do otherwise would be to ignore that the desire to punish defendants for exercising their legal rights arises more often from institutional than from personal wellsprings.

The government also argues that use of a presumption in this case will have dangerous policy consequences. The government contends that such a result will bind prosecutors to the charging decisions of arresting officers and thereby destroy or disable the magistrates' citation system. *See* Brief for Appellant at 36-40. We are not convinced. Even if our holding were to bind prosecutors to all charging decisions of arresting officers, we think the government would suffer no great loss. These charging decisions bind the government when defendants forego their right to trial; we fail to understand why the government believes it needs broad-ranging discretion to up the ante when defendants choose to exercise their trial rights. Moreover, a holding that the circumstances of this case support the use of a presumption will not bind prosecutors to all charging decisions of arresting officers. First, such a holding is limited to the precise circumstances of this case; in other cases, with different facts, the presumption may not lie. Second, even when a court uses a presumption, the government has the opportunity to rebut it; thus, the initial charging deicison "binds" the government only to the extent that the government has no legitimate and articulable reason for changing that decision. Third, the government may be able to escape the presumption altogether by providing notice to the accused. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Supreme Court held that no vindictiveness occurred when a prosecutor informed a defendant during plea bargaining that he might face increased charges if he chose to go trial: the Court stated that a prosecuor who "openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution . . . did not violate the Due Process Clause." *See id.* at 365. This holding suggests the possibility that in order to satisy constitutional requirements, the government need only note on the Citation Form that the de-

fendant will expose himself to enhanced charges if he elects to go to trial. For all of these reasons, we think the government's apprehension of the impending demise of the magistrates' citation system is greatly exaggerated.

The government's arguments thus fail to convince us that the circumstances of this case, when viewed in their entirety, cannot support a realistic likelihood of vindictiveness. Because the government has never attempted to rebut the presumption that arises when a realistic likelihood of vindictiveness exists, we cannot reverse the district court's finding of prosecutorial vindictiveness under a clearly erroneous standard. Put simply, we have reviewed all of the evidence, and it has not left us with the "definite and firm conviction that a mistake has been committed." *See United States Gypsum Co.*, 333 U.S. at 395.

B. ***The Remedy***

The district court chose to remedy the governmental misconduct in this case by dismissing the informations. The government vehemently attacks this choice. As we noted earlier, we can reverse the district court's remedial order only if it constitutes an abuse of discretion. Because we cannot say that the choice of remedy in this case constitutes such an abuse, we reject the government's arguments and affirm the district court's order of dismissal.

The government essentially contends that when confronted with prosecutorial vindictiveness, a court has authority only to dismiss the additional, "tainted" charge. *See* Brief for Appellant at 41. In support of this claim, the government cites several cases in which courts have declined to order any relief other than dismissal of the vindictively motivated charge. *See United States v. Hollywood Motor Car Co.*, 646 F.2d 384, 388-89 (9th Cir. 1981), *rev'd on other grounds*, 458 U.S. 263 (1982); *United States v. Andrews*, 633 F.2d 449, 455 (6th Cir. 1980). The

government concludes that because in this case the prosecutors had already dismissed the additional charge, the district court should have held that "no relief at all was appropriate." Brief for Appellant at 42.

We decline to circumscribe so drastically the remedial authority of district courts in cases marked by prosecutorial vindictiveness. None of the cases that the government cites supports any such broad limitation. In those cases, appellate courts merely stated that dismissal of the additional charge constitutes the usual judicial remedy. *See Hollywood*, 646 at 388-89; *Andrews*, 633 F.2d at 455. In none of the cases cited by the government did the courts strike down a broader remedy ordered by a lower court. Case law thus fails to support the government's proposed approach. Perhaps more important, reason also fails to support the government's position. If in cases of vindictive prosecution the trial court judge may only dismiss the additional charge, the prosecutor will have nothing to lose by acting vindictively. The government's position, if accepted, would remove the deterrent effect of the doctrine of prosecutorial vindictiveness—a doctrine which the Supreme Court *designed* to be largely prophylactic in nature, *see Blackledge*, 417 U.S. at 26. We will not countenance the government's attempt to so vitiate the prohibition against prosecutorial vindictiveness.

Given the trial court's appropriately broad authority to remedy prosecutorial vindictiveness, we cannot say that the district court's decision to dismiss the informations in this case constitutes an abuse of discretion. We note that the remedy is extreme and that the district court judge had no obligation to impose it. *Cf. Hollywood*, 646 F.2d at 389 (stating that the actions of the prosecutor were not "sufficient to *require* the invocation of such an extreme sanction as dismissal of the original, 'untainted' . . . charges" (emphasis added)). The deterrent effect of the rule will remain even if judges resort to this remedy only in

a minority of cases. We therefore do not encourage routine imposition of this broad remedy; indeed, we counsel lower courts to inspect closely both factual circumstances and remedial alternatives before dismissing entire informations. But we uphold the authority of the district court judge to impose that remedy in this case. The judge clearly believed that the circumstances of this case demanded a strong response and that the most appropriate response available was dismissal of the informations. Given the undisputed facts that lie at the base of this appeal, we cannot say the judge acted impermissibly. We therefore affirm.

It is so ordered.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5233

MARY BARTLETT, a/k/a
JOSEPHINE NEUMAN, APPELLANT

v.

OTIS R. BOWEN, SECRETARY,
HEALTH AND HUMAN SERVICES

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-00552)

No. 85-6071

JAMES T. MARTIN, JR.

v.

D.C. METROPOLITAN POLICE DEPARTMENT, ET AL.
RICHARD XANDER, ET AL., APPELLANTS

And Consolidated Case No. 85-6072

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 85-00624)

No. 85-6169

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE MEYER, ET AL.

And Consolidated Case Nos. 85-6171 and 85-6172

Appeals from the United States District Court
for the District of Columbia

(Criminal Nos. 85-00329-01, 85-00330-01
and 85-00331-01)

ON SUGGESTION FOR REHEARING *EN BANC*

Filed July 31, 1987

No. 85-5233

MARY BARTLETT o/b/o JOSEPHINE NEUMAN

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Before: WALD, *Chief Judge;* ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

ORDER

The Court on its own motion, has reconsidered appellee's suggestion for rehearing *en banc*. Upon each reconsideration, it is

ORDERED, by the Court *en banc*, on its own motion, that the order of the *en banc* court of June 8, 1987, and the panel order of the same date, be, and the same hereby are, vacated, and it is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that the judgment, the panel opinion of March 17, 1987 and the dissenting opinion of the same date be, and the same hereby are, reinstated, and it is

FURTHER ORDERED, by the Court *en banc*, that appellee's suggestion for rehearing *en banc* is denied.

The panel filing the opinion of March 17, 1987 is this date entering an order again denying the petition for rehearing directed to it.

Per Curiam

Separate statements are attached, as follows:

1. Circuit Judge Edwards, concurring in the denials of rehearing *en banc,* with whom Chief Judge Wald and Circuit Judges Robinson, Mikva and Ruth B. Ginsburg concur.
2. Circuit Judge Silberman concurring in the denials of rehearing *en banc.*
3. Circuit Judges Bork, Starr, Buckley, Williams and D. H. Ginsburg dissenting from the denials of rehearing *en banc.*
4. Circuit Judge Starr, dissenting from the denials of rehearing *en banc.*

No. 85-6071

JAMES T. MARTIN, JR.

v.

D.C. METROPOLITAN POLICE DEPARTMENT, ET AL
And Consolidated Case 85-6072

Before: WALD, *Chief Judge;* ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

ORDER

The Court on its own motion, has reconsidered appellants' suggestion for rehearing *en banc*. Upon such reconsideration, it is

ORDERED, by the Court *en banc*, on its own motion, that the order of the *en banc* court of May 8, 1987, and the panel order of the same date, be, and the same hereby are, vacated, and it is

FURTHER ORDERED, by the Court *en banc,* on its own motion, that the Section IV of the opinion February 10, 1987, the dissenting opinion, and the judgment of the same date with respect thereto, be, and the same hereby are, reinstated, and it is

FURTHER ORDERED, by the Court *en banc,* that appellants' suggestion for rehearing *en banc* is denied.

The panel filing the opinion of February 10, 1987 is this date entering an order again denying the petition for rehearing directed to it.

Per Curiam

Separate statements are attached, as follows:

1. Circuit Judge Edwards, concurring in the denials of rehearing *en banc,* with whom Chief Judge Wald and Circuit Judges Robinson, Mikva and Ruth B. Ginsburg concur.
2. Circuit Judge Silberman concurring in the denials of rehearing *en banc.*
3. Circuit Judge Ruth B. Ginsburg, concurring in the denial of rehearing *en banc,* with whom Circuit Judge Edwards concurs.
4. Circuit Judges Bork, Starr, Buckley, Williams and D. H. Ginsburg dissenting from the denials of rehearing *en banc.*
5. Circuit Judge Starr, dissenting from the denials of rehearing *en banc.*

No. 85-6169

UNITED STATES of AMERICA

v.

CHRISTINE MEYER, ET AL.
And Consolidated Case Nos. 85-6171 and 85-6172

Before: WALD, *Chief Judge;* ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

ORDER

The Court on its own motion, has reconsidered appellants' suggestion for rehearing *en banc.* Upon such reconsideration, it is

ORDERED, by the Court *en banc*, on its own motion, that the order of the *en banc* court of April 30, 1987, and the panel order of the same date, be, and the same hereby are, vacated, and it is

FURTHER ORDERED, by the Court *en banc,* on its own motion, that the judgment and panel opinion of February 13, 1987 be, and the same hereby are, reinstated and it is

FURTHER ORDERED, by the Court *en banc,* that appellant's suggestion for rehearing *en banc* is denied.

The panel filing the opinion of February 13, 1987 is this date entering an order again denying the petition for rehearing directed to it.

Per Curiam

Separate statements are attached, as follows:

1. Circuit Judge Edwards, concurring in the denials of rehearing *en banc,* with whom Chief Judge Wald and Circuit Judges Robinson, Mikva and Ruth B. Ginsburg concur.
2. Circuit Judge Silberman concurring in the denials of rehearing *en banc.*
3. Circuit Judge Mikva, concurring in the denial of the rehearing *en banc.*
4. Circuit Judges Bork, Starr, Buckley, Williams and D. H. Ginsburg dissenting from the denials of rehearing *en banc.*
5. Circuit Judge Starr, dissenting from the denials of rehearing *en banc.*

EDWARDS, *Circuit Judge, concurring in the denials of rehearing en banc,* with whom WALD, *Chief Judge,* ROBINSON, MIKVA, and RUTH B. GINSBURG, *Circuit Judges, concur:* In decrying the "instability and confusion" allegedly created by our orders vacating *en banc* review in these cases, my colleague Judge Starr elevates some imagined precept of immutability and a self-styled notion of orderliness over correctness as a guiding principle. This utterly misperceives the gravity of the decision to accord rehearing *en banc*—a determination that calls for us to exercise the best of our collective wisdom.

Justice Stewart's admonition that " '[w]isdom too often never comes, and so one ought not to reject it merely because it comes late,' " *Boys Markets, Inc. v. Retail Clerks Local 770,* 398 U.S. 235, 255 (1970) (quoting *Henslee v. Union Planters National Bank and Trust Co.,* 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)), is especially apt in this context. The decision to grant *en banc* consideration is unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel. Such a determination should be made only in the most compelling circumstances.

Contrary to the suggestion made by my dissenting colleague, there is absolutely nothing wrong with a majority of this court acting to reconsider and vacate the ill-conceived grants of *en banc* rehearings in these cases. Under the applicable Federal Rules, this court retains the full authority to act on its own motion to determine whether to hear or rehear cases *en banc*. The simple point here is that a majority of this court has now recognized, albeit belatedly, that the cases at hand do not deserve *en banc* treatment.

The dissent urges that *en banc* review is appropriate in these cases because they are cases of "exceptional importance" where the panel's decision allegedly was either "clearly wrong" or "highly dubious". The problem with this view, however, is that it reduces the "exceptional importance" test to a self-serving and result-oriented criterion. Under the dissenters' standard, one judge's case of "exceptional importance" is another judge's "routine or run-of-the-mill" case, a point well-illustrated by the dissenters' specious characterization of *Bartlett v. Bowen*, 816 F.2d 695 (D.C. Cir. 1987). The dissenters have labelled *Bartlett* a "sweeping and revolutionary decision," almost as if to suggest that it represents *the* seminal opinion in constitutional adjudication. Such a statement is quite extraordinary, however, because, as any reader of it can plainly see, the decision in *Bartlett* merely follows well-established Supreme Court precedent.

The dissenters also claim that *Bartlett* "purported to decide the highly controversial question of Congress' power to remove Supreme Court jurisdiction over constitutional challenges under the exceptions clause of article III of the Constitution;" but this is a flagrant misstatement of the opinion. The majority in *Bartlett* merely observed that

> [C]ourts and legal scholars routinely assume that there is a due process right to have the scope of constitutional rights determined by some independent judicial body—and the Supreme Court has never held or hinted otherwise. On the contrary, although it is undisputed that Congress has some leeway to affect the jurisdiction of the lower federal courts, Congress may not deny to a person attacking a statute "the independent judgment of a court on the ultimate question of constitutionality." *St. Joseph Stock Yards Co. v. United States*, 398 U.S. at 84 (Brandeis, J., concurring).

> Although there is no definitive answer to the question whether there are constitutional restraints when Congress seeks to limit the jurisdiction of all *federal* courts, we need not address that question here.

Bartlett, 816 F.2d at 706 (footnote omitted). The majority in *Bartlett* expressly declined to define the full reach of Congress' power under the exceptions clause of article III. *Id.* In light of the dissenters' misstatement of the holding in *Bartlett,* it is difficult to resist the conclusion that my dissenting brethren would like to rehear *Bartlett en banc* so that *they* might create some "sweeping and revolutionary" new law in the area of constitutional adjudication. This would be a gross abuse of the *en banc* process.

My dissenting colleague leaves the impression that rehearings *en banc* involve no significant expenditure of judicial energies. In fact, the institutional cost of rehearing cases *en banc* is extraordinary. Each year, every judge has a heavy schedule of brief-reading, oral arguments, motions work and opinion-writing in connection with cases on the regular calendar. It is an enormous distraction to break into this schedule and tie up the *entire* court to hear one case *en banc.* It especially burdens judges who already are carrying a large backlog of cases, and it substantially delays the case being reheard, often with no clear principle emanating from the *en banc* court.

Underlying the dissenters' calls for rehearings *en banc*—and especially their resort to a "clearly wrong"/"highly dubious" test to determine when to rehear a case *en banc*—is the implicit view that every time a majority of the judges disagree with a panel decision, they should get rid of it by rehearing the case *en banc.* The error in this proposition is the concept that it is somehow desirable that majority rule should determine the outcome of cases. However salutary that principle may be in the context of popularly elected legislatures where a majority decision reflects the will of the voters who chose the

lawmakers, it has no equivalent value in an intermediate court of review. The fact that 6 of 11 judges agree with a particular result does not invest that result with any greater legal validity than it would otherwise have. The reason we use majority rule on a panel is because there must be some device for reaching a decision where there is disagreement among three judges; it is not because correctness is assured by having as many legal minds as possible in agreement.

The dissent's "clearly wrong"/"highly dubious" test not only serves no useful purpose in this intermediate appellate judicial context, it does substantial violence to the collegiality that *is* indispensable to judicial decisionmaking. Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case *en banc* in order to vindicate that judge's position. Politicking will replace the thoughtful dialogue that should characterize a court where every judge respects the integrity of his or her colleagues. Furthermore, such a process would impugn the integrity of panel judges, who are both intelligent enough to know the law and conscientious enough to abide by their oath to uphold it.

The Federal Rules of Appellate Procedure explicitly recognize that *en banc* rehearing is "not favored and ordinarily will not be ordered," except when consideration is necessary to secure or maintain uniformity of decisions or when a case involves a question of exceptional importance. FED. R. APP. 35(a). Under this rule, it is well-understood that it is only in the rarest of circumstances when a case should be reheard *en banc*. In other words, for the appellate system to function, judges on a circuit must trust one another and have faith in the work of their colleagues, including Senior Judges and visiting judges from other circuits. Obviously, no judge agrees with all of the decisions handed down in the circuit, nor would every judge write a particular opinion in the same fashion. But

if such disagreements determined whether or not a case should be reheard *en banc*, the number of *en banc* rehearings would increase at least a hundredfold.

By declining to rehear a case, "[w]e de not sit in judgment on the panel; we do not sanction the result it reached." *Jolly v Listerman*, 675 F.2d 1308, 1311 (D.C. Cir.) (Robinson, C.J., concurring in denial of rehearing *en banc*) (footnote omitted), *cert. denied*, 459 U.S. 1037 (1982). We decide merely that, because the case does not present questions of " 'real significance to the legal process as well as to the litigants,' " review by the full court is not justified. *Id.* at 1310 (quoting *Church of Scientology v. Foley*, 640 F.2d 1335, 1341 (D.C. Cir.) *(en banc)* (dissenting opinion), *cert. denied*, 452 U.S. 961 (1981)).

In conclusion the court's decisions denying the suggestions for rehearing *en banc* in these cases are fully justified and commendably in accord with the legal standards that appropriately guide the determination to rehear a case *en banc*. Anyone who doubts the wisdom of that determination here would be well-advised to go directly to the original panel opinions for an accurate statement of the case holdings.

MIKVA, *Circuit Judge,* concurring in the denial of rehearing *en banc*: I join in Judge Edwards' statement responding to the dissenters. I write additionally to set the record straight on *United States v. Christine Meyer.* In challenging the decision to reinstatate the panel opinion in *United States v. Christine Meyer,* 816 F.2d 295 (1987), the dissenters mischaracterize the panel's holding, and misconceive the facts of the case. More importantly, they misinterpret the relevant decisions of the Supreme Court and imply an effort on the part of the panel to subvert the impact of those Supreme Court cases. Their contentions are untenable.

In *U.S. v. Goodwin,* 457 U.S. 361 (1982), the Supreme Court declined to adopt any per se rules regarding prosecutorial vindictiveness in the pretrial context. The Court determined that the per se rule applicable in the post-trial context was not suitable for pretrial situations. In post-trial cases, a presumption of vindictiveness will lie whenever the prosecutor "ups the ante" following a defendant's exercise of a legal right. On the other hand, the Court refused to adopt a "per se rule" that in the pretrial context *no* presumption of vindictiveness can ever lie. The lesson of *Goodwin* is that proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not *alone* give rise to a presumption in the pretrial context. The rationale supporting the Court's teaching is that this sequence of events, taken by itself, does not present a realistic likelihood of vindictiveness. But when additional facts combine with this sequence of events to create such a realistic likelihood, a presumption will lie in the pretrial context. The critical question is whether the defendants have presented such facts—whether the defendants have shown that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and therefore give rise to a rebuttable presumption.

The panel's opinion held that the defendants in this case presented evidence that could allow a court to find that there was a realistic likelihood of vindictiveness and that a presumption thus applied. The dissenters at times suggest that the panel "defied" *Goodwin* by holding that a prosecutor's decision to up the ante following a defendant's exercise of a legal right *itself* created a presumption of vindictiveness. The panel held no such thing. It enumerated four very specific factors not present in *Goodwin* that, when added to the prosecutor's decision to increase charges, provided the extra circumstances to support a realistic likelihood of vindictiveness—and therefore an allowable presumption of vindictiveness. Any suggestion that the panel's opinion is more broad is just not so.

When the dissenters do acknowledge the panel's inspection of the actual set of circumstances in the case, they attempt to dismiss them by referring to the prosecutor's recognized interest in conducting plea negotiations. This reasoning is most strange, since there *were no plea negotiations in this case.* The government's decision to increase charges did not occur in the context of plea bargaining. It occurred when the defendants refused to pay the fine assessed against all the other defendants involved and asked for trial. The panel's decision explicitly recognizes that had the prosecutor informed the defendants during plea bargaining that they might face increased charges if they chose to go to trial, a court could not find prosecutorial vindictiveness. The dissenters' inattention to this statement and to the actual facts of this case suggests most careless and frivolous evaluation of the panel opinion.

GINSBURG, RUTH B., *Circuit Judge:* I concur in Judge Edwards' statement and add a few comments, in which Judge Edwards joins, about one of the three cases that will not be reheard.

To demonstrate the *Martin v. D.C. Metropolitan Police Department,* 812 F.2d 1425 (D.C. Cir. 1987), warrants en banc attention, our dissenting colleagues indulge in much "make believe" about that case and the precedent it applies, *Hobson v. Wilson,* 737 F.2d 1 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985). We note some glaring omissions:

1. In the *Hobson* case itself, discovery was not at issue on appeal, for it had long since been completed.

2. *Hobson* acknowledged the existence of cases in which "plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage," and therefore cautioned against "overly rigid application" of the pleading rule the case announced in dictum. *Hobson,* 737 F.2d at 30-31.

3. In *Martin* a highly competent district judge, diligently endeavoring to apply *Hobson* to a different case and setting, did not find it at all "plain" or "clear" that *Hobson* installed an altogether rigid, entirely automatic approach; indeed, the district judge ruled in Martin's favor and allowed him to proceed to uncircumscribed discovery.

4. The appellate panel in *Martin,* applying *Hobson* as the author of that opinion comprehended the precedent, cut back allowable discovery severely, permitting only a sharply limited, precisely defined line of inquiry, and even then, only because of special exigencies in the particular case.

5. The *Martin* panel announced this bottom line: "If, after the limited discovery we have specified, [Martin] has not presented an amended complaint containing 'nonconclusory allegations of evidence of

[unconstitutional] intent,' . . . his constitutional tort claims *must be dismissed." Martin,* 812 F.2d at 1438 (emphasis added).

Only by "sweeping all the chessmen off the table" can one find, as the dissenters purport to do, "square conflict between [*Martin*] and *Hobson,"* an open door for discovery, grace à *Martin,* with respect to "any complaint" alleging unconstitutional motive, or no utility in a motion to dismiss such a case after *Martin. See* Hand, *Mr. Justice Cardozo,* 52 HARV. L. REV. 361, 362 (1939) ("He never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table."). Sensibly read and applied, *Martin* should arm, not disarm, the government in opposing baseless lawsuits. At the same time, *Martin* coupled with *Hobson* should inhibit precipitous dismissal of genuinely meritorious claims.

SILBERMAN, *Circuit Judge,* concurring in the denials of rehearing *en banc:* As should be apparent, some change in the court's thinking concerning the desirability of *en bancs* has taken place. We have now vacated *en banc* orders in four cases—the three we deal with today and *Mississippi Industries v. FERC,* 808 F.2d 1525 (D.C. Cir. 1987) in which the *en banc* order was vacated and the panel agreed to adopt the dissent. *See* Orders of June 24, 1987.[1] I am one who, upon reflection, has reconsidered his views and am now inclined to favor *en bancs* only in cases of exceptional importance *to this Circuit.* For instance, a case that permitted us to resolve a substantial conflict within our own precedents or address an issue with an unusually significant impact on the work of the Circuit would be the type that warrants the institutional costs of a time consuming and unwieldy *en banc* resolution. When the Supreme Court is likely to grant certiorari to decide an issue of national import, *en banc* treatment may be superfluous unless the panel opinion[s] failed to discuss a major issue.

Given the increasing number of cases designated for *en banc* rehearing and the considerable strain those cases place, directly and indirectly, on the functioning of the court, I see nothing unusual or improper in the court's reassessment of its *en banc* caseload. Accordingly, I concur in the court's decisions today. I write separately, however, to explain why, in my view, each of the three cases we deal with today is inappropriate for rehearing *en banc.*

JAMES T. MARTIN v. D.C. METROPOLITAN POLICE DEPARTMENT, ET AL., 812 F.2d 1425 (D.C. Cir. 1987)

The dissent believes this case warrants rehearing because directly inconsistent with the portion of *Hobson v. Wilson*

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[1] Judge Starr apparently does not object to our reconsideration of that case.

entitled "*Pleading Unconstitutional Motive,*" 737 F.2d 1, 29-31 (D.C. Cir. 1984). But as the majority opinion diplomatically implied, *see Martin*, 812 F.2d at 1436 n.22, virtually that entire section of *Hobson* was dicta. Since in *Hobson* the panel did not doubt that the complaint met the *Harlow* standard of sufficient specificity, *see Hobson,* 737 F.2d at 31, the discussion of the outer boundaries of that requirement—particularly as it related to discovery—was unnecessary to the decision. It is not surprising therefore that two of the *Hobson* panel members, sitting again in *Martin*, so vigorously dispute the meaning of the prospective rule announced in *Hobson*. Be that as it may, I do not think the *holding* in *Hobson* is even arguably inconsistent with *Martin*.

Moreover, I read the *Martin* panel opinion as its author does, as limited to the "special exigencies" in this case. I take the opinion to hold that plaintiff is entitled to limited discovery as to what occurred at the November 29th meeting, despite plaintiff's failure to allege direct evidence of unconstitutional motive, because our previous opinions had not been totally clear on the pretrial development of limited immunity cases. *See Martin,* 812 F.2d at 1436. Presumably the next plaintiff will not receive such leeway.

U.S.A v. CHRISTINE MEYER, ET AL., 810 F.2d 1242 (D.C. Cir. 1987)

This case lacks, in my view, the broad significance the dissent attaches to it. The district court found actual vindictive prosecution and the Supreme Court in *United States v. Goodwin,* 457 U.S. 368 (1982), has acknowledged that such a finding is possible even in a pre-trial setting. *See id.* at 380-81. The panel opinion, however, did not actually affirm the district court's finding. After discussing the limited scope of review of that finding (clearly erroneous), *see Meyer*, 810 F.2d at 1244-45, it concluded that *under the facts presented* a presumption of vindictive prosecution should apply. The opinion could well be read as holding only that the district court legitimately

drew inferences from the facts to make its finding that the government engaged in vindictive prosecution. That the government increased the charge and potential penalty for those who insisted on the right to trial still does not, by itself, permit a finding of vindictive prosecution—with or without a presumption. The key (and unusual) additional fact here is that after the government "upped the ante' and defendants asked for the jury trial to which they were entitled on the graver charge, the government reversed course and moved to dismiss the additional charge so as to avoid the jury. I doubt that kind of unseemly prosecutorial maneuvering is common and therefore believe the impact of the majority opinion is quite limited.

I think the dissent exaggerates by accusing the panel opinion of undercutting the Supreme Court's statement in *Bordenkircher v. Hayes.* 434 U.S. 375 (1978), that "[I]n the give-and-take of plea bargaining there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363. Here, unlike in *Bordenkircher,* the defendants (at least some of them) were *not* warned that if they refused to plead guilty they might face additional charges.

The remedy chosen by the district court is in this case, I admit, somewhat dubious. But I am unwilling to conclude, as apparently do the dissenters, that no matter how badly the government behaves in increasing the charge against a defendant, the district court may not dismiss the whole case, but is instead limited to excising only the additional charge. *Cf. United States v. Omni Int'l Corp.,* 634 F. Supp. 1414, 1436-40 (D. Md. 1986).

MARY BARTLETT v. BOWEN, SECRETARY OF HHS,
816 F.2d 695 (D.C. Cir. 1987)

It took the panel over a year to produce the majority and dissenting opinions. In the process both authors, like World War I armies scrambling sideways to the channel,

covered a good deal of ground. The majority's constitutional holding is, of course, dicta, but I do not deny the case's importance because the majority's perception of the constitutional issue governs its interpretation of the statute. Furthermore, were I forced to choose, I would be inclined to favor the dissent's analysis. I think it likely, however, that the Supreme Court will grant certiorari (if the government seeks it) and I seriously doubt that *en banc* treatment will add much to the panel's discussion of the issues and its review of what is, in truth, somewhat puzzling Supreme Court precedent. The question will surely eventually be resolved by the Supreme Court and, in the meantime, I doubt very much whether the work of this court will be seriously affected by our refusal to rehear the case.

BORK, STARR, BUCKLEY, WILLIAMS, and D. H. GINSBURG, *Circuit Judges, dissenting from vacatur of the orders and from denials of rehearing en banc in Nos. 85-6169, 85-6071/72, and 85-5233*: After full deliberation, the court voted to vacate the panel opinions in these cases and to rehear the cases en banc. Now the court vacates the prior orders in each of the three cases, denies the petitions for en banc rehearing, and reinstates all three panel opinions.

It is apparent that each of the cases today removed from our rehearing docket deserves en banc reconsideration. Each involves an issue of exceptional importance and, as we demonstrate below, each received a panel resolution that we think is clearly wrong, and is, at the very least, highly dubious. The discussions of the first two cases are brief because in each there was a full dissent at the panel stage. The reader may find further information about what we think wrong with the panel majorities's decisions in those dissents. Rather fuller treatment is accorded the third case because there was no dissent on the panel.

Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987)

The Medicare Act denies reimbursement for nursing care cost if the applicant, during the same spell of illness, had been reimbursed for the costs of prior nursing care in a Christian Science facility. Appellant Bartlett sued to recover costs denied by the Secretary of the Department of Health and Human Services under this provision. Bartlett maintained that the provision violated the first amendment's guarantee of the free exercise of religion and the equal protection component of the fifth amendment's guarantee of due process. The district court dismissed the complaint for want of subject matter jurisdiction. Only the jurisdictional ruling was before the panel on appeal.

The Medicare Act provides that any individual dissatisfied with the Secretary's determination of benefits is entitled to judicial review. Section 1395ff(b)(2),

however, states that judicial review shall not be available "if the amount in controversy is less than $1000." Bartlett's claim was for $286. The statutory language is flat and contains no hint of any exception for suits asserting a constitutional claim. There is also no hint of any intention to allow an exception of any sort in the legislative history. It is clear, moreover, that the statute's preclusion of judicial review was Congress' assertion of sovereign immunity, a doctrine of American law that is as old as the nation and which is routinely invoked by the Supreme Court to deny jurisdiction over suits against the government for benefits. Sovereign immunity denies jurisdiction over such claims whether their legal basis is constitutional or nonconstitutional.

The panel majority reversed the judgment of the district court, holding that the court had jurisdiction to decide Bartlett's claim on the merits. The opinion said the statute had to be read to contain an exception for claims that depended upon a challenge to a statute's constitutionality. Though, given that statutory interpretation, there was no need to go further, the panel majority went on to give its opinion that Congress could never withhold jurisdiction over a constitutional challenge in both state and federal courts. In doing this, the majority purported to decide the highly controversial question of Congress' power to remove Supreme Court jurisdiction over constitutional challenges under the exceptions clause of article III of the Constitution: "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." The majority said that Congress could never take a constitutional issue from all courts.

The upshots of the decision, then, is this.

Despite the clearest statutory language and legislative history to the contrary, and statute precluding judicial review of a benefit claim will be read to contain an exception for a claim that advances a constitutional argument.

This means that the solidly entrenced doctrine of sovereign immunity no longer applies in such cases. The ruling necessarily applies not only to federal sovereign immunity, which is derived from article III, section 2, of the Constitution, but to the sovereign immunities of the several states under the eleventh amendment. *Bartlett* is thus a sweeping and revolutionary decision, quite aside from its gratuitous dicta concerning congressional power over the Supreme Court's jurisdiction. In this circuit, at least, it will have great impact on benefits legislation. Indeed, it will probably draw claimants to litigate here. We find it inconceivable that the case is not worthy of the full court's attention.

Martin v. D.C. Metropolitan Police Department, 812 F.2d 1425 (D.C. Cir. 1987)

The court once deemed this case worthy of rehearing en banc out of concern for its precedential import regarding the issue of what allegations must be pleaded in a complaint in order to prevent dismissal of a tort claim against federal law enforcement officials premised on a claim of unconstitutional motive. Plaintiff-appellee charged officers of the United States Capitol Police with violation of his rights under the fifth amendment to the Constitution. Martin's basic allegation was the defendant officers had conspired to pursue his arrest and indictment in order to divert attention from a police assault upon him in connection with a public demonstration and to deter him from exercising his legal rights.

In *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the court addressed this precise issue and set down clear and exacting pleading requirements:

> [I]n cases involving a claim that defendants acted with an unconstitutional motive, we will require that nonconclusory allegations of evidence of such intent must

> be present in a complaint for litigants to proceed to discovery on the claim.

737 F.2d at 29. The court then went on to state that "plaintiffs must produce some *factual support* for that claim to avert dismissal." *Id.* at 30 (emphasis added).

Despite the clarity of *Hobson*, the panel majority, by failing to dismiss the action, implicitly found the following allegation in the complaint sufficient to preclude dismissal:

> As a result of public and media attention to the unprovoked attack on plaintiff, defendants conspired to develop an unlawful scheme to deflect attention from their actions and to deter plaintiff from seeking to vindicate the violation of his rights.

First Amended Complaint, ¶ 18, J.A. at 26, 31. This cannot possibly be considered to be a "nonconclusory allegation[] of evidence" of unconstitutional intent. Nor is there anything in this allegation which could be called "factual support."

It is plain, therefore, that if *Hobson* had been followed, Martin's complaint would have been dismissed on the pleadings. The panel majority nevertheless rewrote *Hobson* and held that Martin was entitled to "limited discovery." Fairness was said to require this result because "the approach to pretrial development of cases such as this one was far from clear and certain when the district court made its rulings in Martin's favor." 812 F.2d at 1436. The only thing that was not "clear" under *Hobson*, however, was the principle that limited discovery is, as the majority appears to hold, available upon the basis of a complaint that contains absolutely no "nonconclusory allegations of evidence of [unconstitutional] intent" (emphasis added). This option existed only after the majority misread the clear language of *Hobson* to prohibit only "protracted discovery." *Id.* at 1439 (Edwards, J., concurring).

Nor do we understand how the fact that the district court erred in allowing "uncircumscribed discovery," *see id.* at 1436 n.22 changes the analysis. The complaint in this case was insufficent under *Hobson* and should have been dismissed. Alternatively, the court should have remanded with an instruction to grant leave to amend. There is simply no rational support for the option chosen by the majority—permitting appellant on remand to engage in limited discovery on the basis of a clearly insufficient complaint.

Rehearing en banc of the *Martin* decision is thus required because of a square conflict between that decision and *Hobson*. It is also required because the decision, if read by the district court and by litigants as we read it, could render the motion to dismiss useless. If the vague, nonfactual allegations in Martin's complaint are enough to withstand dismissal and to entitle him to discovery, one can hardly imagine any complaint that would not be able to achieve that result. The panel opinion thus has the potential to deprive the government of a needed defense against baseless lawsuits.

Even if our interpretation of *Martin* is not the one that the majority intended, as its author says today it is not, five members of this court so read it. Other courts could reasonably interpret the opinion, as we have, to allow limited discovery on the basis of *any* allegation of unconstitutional motive. Perhaps our reading is wrong; we hope that it is. But if so, then there is an even stronger case for rehearing, *viz.*, so the court could clarify the opinion for the benefit of those who must follow it.

United States v. Meyer, 810 F.2d 1242 (D.C. Cir. 1987)

The Supreme Court has made it clear that the prosecutors' charging decisions are not generally subject to close judicial scrutiny. Notwithstanding this direct Supreme Court authority, a panel of this court has held, to

the contrary, that where a defendant decides to contest an ordinary police citation, and a United States Attorney files an information containing a misdemeanor charge not originally included in the citation, a presumption of prosecutorial vindictiveness arises warranting dismissal of all charges. The panel's decision is clearly inconsistent with *United States v. Goodwin*, 457 U.S. 368 (1982), and may seriously hamper the effective conduct of prosecutions in this circuit.

On April 22, 1985, United States Park Service police issued citations to approximately two hundred political demonstrators outside the White House. Each citation charged a violation of 36 C.F.R. § 50.19 (1985), which makes it a misdemeanor to demonstrate on park grounds without a permit. Most agreed to pay a $50 fine in full satisfaction of the charge, but appellees decided to contest their charge in court. The decision as to the violation to be charged in the citations was made by the Park policemen, who are not lawyers. When the United States Attorney drafted the requisite informations for appellees' separate arraignments, he charged them under section 50.19, and also under a more specific regulation, 36 C.F.R. § 50.30 (1985), which makes it a misdemeanor to obstruct sidewalks. The second charge was added as a part of a "plea offer" to some of the defendants; a number of the defendants accepted this "plea arrangement," but appellees chose to go to trial. *See Meyer*, 810 F.2d at 1244.

Appellees moved to dismiss the information because of prosecutorial vindictiveness. At the hearing on the vindictiveness issue, the government moved to dismiss the second charge. The district court granted the government's motion to dismiss the second charge in the informations, but also dismissed the informations themselves. The district court found "actual vindictiveness" in the government's addition of the section 50.30 charges, which the

court concluded was motivated by a desire to punish appellees for electing to contest their section 50.19 charges in court.

The panel declined to reach the district court's finding of actual vindictiveness, but decided instead that a presumption of prosecutorial vindictiveness was warranted. The panel's purported authority for applying such a presumption is *Blackledge* v. *Perry*, 417 U.S. 21, 27-29 & n.7 (1974).

Blackledge is inapplicable on its face. In that case a prisoner, Perry, had been convicted of misdemenor assault for an attack on a fellow inmate. He received a six-month sentence from a lower court. Under North Carolina law that court had exclusive jurisdiction for the trial of misdemeanors. State law also provided that anyone convicted of a misdemeanor in that court had a right to trial *de novo* in a higher court. Perry filed a notice of appeal pursuant to that right. After he did so, however, the prosecutor obtained a grand jury indictment charging him with assault with a deadly weapon in connection with the same conduct for which Perry had already been given a six-month sentence. Perry pleaded guilty and received a sentence of five to seven years in prison. On petition for a writ of *habeas corpus*, the Court found a likelihood that the prosecutor had sought Perry's felony conviction to punish him for seeking retrial. The Court concluded that such a likelihood warranted a presumption of prosecutorial vindictiveness.

The panel maintains that *Blackledge* applies in this case. Perry was charged with a felony, however, after he exercised his right to automatic appeal of a conviction for a misdemeanor. The presumption of vindictiveness was thus applied in a post-trial setting, not to pretrial charging decisions.

In *Goodwin*, however, the Supreme Court refused to adopt a presumption of prosecutorial vindictiveness in the pretrial setting. The Court explicitly distinguished *Blackledge* on this basis, and explained why it did not apply in the pretrial setting. *Goodwin*, 457 U.S. at 369-70, 383-84. There the prosecutor added a felony charge against the defendant after the defendant had refused to plead guilty to a misdemeanor charge. Holding that the "prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution," *id.* at 382, the Court refused to hold that this conduct warranted a presumption of vindictiveness. "The possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness is certainly not warranted." *Id.* at 384 (emphasis in original).

In this case, the panel refused to follow *Goodwin* and instead applied a presumption of vindictiveness in circumstances indistinguishable from *Goodwin*. The issues raised by that decision are of great importance. Unless the Supreme Court decides to correct our error by writ of certiorari, prosecutors in this circuit will know that if they add just one charge to those made at the time of arrest, they risk dismissal of their entire case. *Cf. Meyer*, 810 F.2d at 1249 ("The deterrent effect of the rule will remain even if judges resort to this remedy only in a minority of cases."). This result severly limits the prosecutor's discretion about how best to bring charges and to conduct plea negotiations. It ignores the Supreme Court's recognition of "the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his constitutional right to stand trial." *Goodwin*, 457 U.S. at 378. And it undercuts the Court's explicit statement that

"in the 'give-and-take' of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Bordenkircher* v. *Hayes,* 434 U.S. 357, 363 (1978). Perhaps most disturbingly, when quelling public disturbances the police will be under pressure to charge those arrested for all possible violations lest it becomes impossible to prosecute them later for any one of them. *Cf. Meyer,* 810 F.2d at 1248 ("Even if our holding were to bind prosecutors to all charging decisions of arresting officers, we think the government would suffer no great loss."). With respect, for us at least the panel's decision speaks against itself

The panel's attempt to distinguish *Goodwin, see Meyer,* 810 F.2d at 1246-47, is unsuccessful. The fact that some defendants pleaded guilty and thus did not receive added charges does not show that the prosecutor "discriminated" among defendants on any other grounds than whether they had pleaded guilty during the plea negotiations; yet the Court in *Goodwin* explicitly held that "changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial 'vindictiveness.' " *Goodwin,* 457 U.S. at 379-80. Nor is it at all clear why the panel should have been willing to presume vindictiveness because of either the simplicity of the facts that underlie the charges or the complexity of the legal arguments that defendants may raise in their defense. *Meyer,* 810 F.2d at 1246-47. Those facts seem utterly irrelevant.

Finally, the other factor that the panel relied on to justify its holding of presumed vindictiveness—the government's conduct after increasing the charges against the defendant—is also unavailing. The panel noted that at the trial court hearing on vindictiveness the government moved to drop the very charges it had recently added against the defendants. The panel's misguided attempt to

infer probable vindictiveness from the fact is demonstrated by the weakness of the inferential chain that it constructs. The withdrawal of charges, like the addition of charges, may occur for a multitude of reasons that all fall within the realm of acceptable prosecutorial discretion—a point that the panel perhaps concedes when it admits that the withdrawal of charges here may have been in good faith, and the prosecutor may have simply changed his mind. The panel speculates, however, that the additional charge may have been withdrawn to avoid the necessity of a jury trial, which the trial judge had granted to the defendants after this charge had been added against them. Yet this flatly ignores the Supreme Court's recognition that this would be a perfectly acceptable motivation for adding or dropping charges: "the prosecutor's interest at the bargaining table," which the Court has found to be a legitimate interest, "is to persuade the defendant to forgo his constitutional right to stand trial." *Goodwin*, 457 U.S. at 378. This is nothing more than the ordinary "give-and-take" of plea bargaining, and here the defendants were entirely "free to accept or reject the prosecution's offer." *Hayes*, 434 U.S. at 363; *see also Goodwin*, 457 U.S. at 380 ("just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded"). Once again, this conduct by the prosecutor does not support any presumption of vindictiveness, though the defendant is of course free to try to prove actual vindictiveness based on such conduct.*

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* No other circuit has repudiated *Goodwin's* holding that no presumption of vindictiveness will apply in the pretrial context. The two cases cited in the panel opinion do not support its result. In United States v. Krezdorn, 718 F.2d 1360 (5th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984), the Fifth Circuit stated that a presumption of vindictiveness would lie when the prosecutor decided "to increase the

In the end, therefore, the Court held in *Goodwin* that judicial interference in prosecutors' charging decisions is to be avoided, even at the risk that a prosecutor's decision to sanction defendants for invoking their right to a jury would go unpunished for want of proof. If the Court reached that judgment in regard to the right to a jury, it is out of the question for us to reach a contrary judgment to protect appellees' right to contest a $50 citation.

An independent problem with the panel's decision in this case, which compounds the unfortunate effects of its holding, is the remedy that it approved. The trial court, which had made a finding of actual vindictiveness, dismissed all the charges against the defendants, even those brought originally and thus not tainted by any allegations of vindictiveness. The panel concedes that this is an "extreme" remedy, and is unable to point to any prior cases in which it had been imposed. *Meyer*, 810 F.2d at 1249. There is good reason for this want of authority. We do not lightly presume that prosecutors act in bad faith when they exercise the considerable powers that society has vested in them to enforce the laws. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *Goodwin*, 457 U.S. at 382. Thus, the proper remedy for prosecutorial vindictiveness is removal of the illegality. The question is not whether "the prosecutor will have nothing to lose by acting vindictively," *Meyer*, 810 F.2d at 1249, but merely

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number or severity of charges following a successful appeal." *Id.* at 1365. That is not a pretrial decision; it penalizes a defendant for appealing from a conviction, which is what the Supreme Court held unacceptable in *Blackledge*. And in United States v. Gallegos-Curiel, 681 F.2d 1164 (9th Cir. 1982), the court's suggestion that a presumption of vindictiveness might lie in certain extreme circumstances, *see id.* at 1168-69, was pure dictum since no such presumption was found to be appropriate in that case.

ensuring that the prosecutor will have nothing to *gain* by acting vindictively. The strong political checks on prosecutorial conduct will ensure that he has something to lose by acting unjustifiably. An extreme remedy such as the one in this case, however, would mean that society has lost its ability to prosecute an individual on what are understood by all to be legitimate charges. If there was any actual vindictiveness in this case, it was cured when the additional charges against the defendants were dropped.

In sum, the panel's holding in this case is an unjustified departure from controlling Supreme Court precedent. It represents a view of the plea-bargaining process that is sharply different from the more realistic view taken by the Supreme Court. if allowed to stand, it will significantly hamper prosecutors in this circuit from exercising their discretion in ways the Court has recognized as legitimate.

For the reasons set forth, we dissent from the denials of rehearing en banc.

STARR, *Circuit Judge,* dissenting from vacatur of the orders in Nos. 85-6169, 85-6071/72, 85-5233: At the Founding, the Framers of our system of government envisioned that Article III courts would be institutions where judgment, not will, was exercised. We in the judiciary are thus to be quite unlike the political branches as we carry out what Justice Frankfurter aptly described as a calling with sacerdotal qualities.

Whether a particular exercise of judicial judgment is sound or not is itself, I recognize, peculiarly a matter of judgment. There is apt to be no incontestably "right" answer if the issue is truly one entrusted to the exercise of a court's judgment. What is right and meet will depend in large measure upon one's conception of what is appropriate and proper under the circumstances.

And thus I relate what is nothing other than my own perception of what has occurred today. My judgment may well be dismissed as idiosyncratic or simply outmoded in the contemporary world of an overburdened and expanding judiciary. But, in my view, it is destabilizing and unseemly for courts, which should be solid rocks in a world filled with rolling stones, to lurch suddenly from one course to another. To be sure, courts enjoy the sheer power to make 180 degree turns in judgment. But my concerns go beyond the issue of power.

So too, I recognize that some will say that corrections of a "mistake," albeit one thrice committed in breathtakingly short order, is but a symbol of an institution's wisdom and maturation. But it is, in my judgment, unwise to tear asunder in one mighty blow that which was duly considered and decided upon after careful reflection by the full court. It is quite unlikely that a "mistake," which obviously could infect the exercise of judgment as to one case, would suddenly spread with prairie-fire speed to consume three cases of significance.

I am persuaded that we have today contributed to a regrettable aura and reality of instability and confusion. This is all the more to be lamented in a court blessed with our rich tradition and history, including a heritage in the highest traditions of bench and bar of lively disagreement.

We should stay the course in all three cases.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIMINAL NOS. 85-329, 85-330, 85-331

UNITED STATES OF AMERICA

v.

THERESA FITZGIBBON, ET AL., DEFENDANTS

Washington, D.C.

September 11, 1985

The above-entitled matter came on for trial before the Honorable Aubrey E. Robinson, Jr., Chief Judge, at 9:45 a.m.

Appearances:

ROBERT MCDANIEL, AUSA
FOR THE GOVERNMENT

DANIEL ELLENBOGEN, ESQ.
SEBASTIAN GRABER, ESQ.
FOR THE DEFENDANTS

DAWN T. COPELAND
OFFICIAL COURT REPORTER

PROCEEDINGS

The Deputy Clerk: United States of America v. Theresa Fitzgibon, et al. Criminal Nos. 85-329, 85-330. Criminal No. 85-331.

Mr. Robert McDaniel for the government and Mr. Daniel Ellenbogen and Sebastian Graber for the defendants.

* * * * *

The Court: It is my view that Goodwin does not control this case on the facts that we know.

Goodwin, as lawyers know who have read this case, was a situation in which the misdemeanor charges were brought. There was discussion and the prosecutor said, look, cop to these pleas or something big and bad can happen to you.

In essence that is what he was told. The defendant says, no.

The prosecutor said, fine. He got a grand jury indictment, felonies arising out of the same basic information, and the court of appeals didn't like it and the supreme court said, no, that is quite all right, because it was in the context of a give and take between the prosecutor and the defendant and the defendant had made his election knowing that he faced stiffer charges down the way, which was his right to do no matter what the prosecutor thought about it or the inconvenience that it was going to put to the government.

These case all have to depend upon the facts and it is uncontradicted on this record that having been arrested, every one of these defendants knew exactly what he was arrested for.

They show up for an arraignment and have to respond to an information involving two counts.

There was no notice, formal, informal, to the individual pro se defendants or through counsel that the possibility existed that if they didn't post the collateral or forfeit the collateral, they were going to be subjected to additional charges whether or not they arose out of that incident or anything else that the government chose legitimately to bring against them which is an entirely different situation.

The initial charge, a petty misdemeanor, the minimum possibility of a fine or incarceration suddenly blossoms into the possibility of a $1,000 fine and a year in jail absolutely out of the blue, so to speak, with no additional reasons that could have possibly been conjured up or in fact were offered by the government, although the government is not obligated, necessarily, to tell you its reasons, but there has to be some basis for it which changes the situation.

Goodwin clearly indicates to this court that whatever the basis for the change in the government's position, some knowledge and information has to be given to an individual defendant so that she or he can make the determination or election whether they want to face the additional charges.

No such opportunity was ever afforded any one of the defendants presently charged through counsel, through notice, or anything else. You elect not to forfeit and you tell the government we want to go to trial and the government says, fine. We are going to arraign you but on what?

On a two-count information and the fact that the government contends, and I don't dispute the government's contention because the offer has been made in open court and the fact that the government is still willing for you to forfeit the $50 and go about your business doesn't change the picture one iota as far as the legal status in which the government finds itself and which you find yourselves.

To this court, what the court of appeals will think about it, I don't know, but to this court it's a clear indication that in the exercise of your right to have a jury trial, the government upped the ante, as far as the government is concerned, with no notice, no consultation, with no opportunity for you to make an election.

I think that is a violation of your due process rights and I dismiss the information as to all defendants.

Mr. Ellenbogen: Thank you, your honor.

(Whereupon, the hearing was concluded.)

CERTIFICATE OF REPORTER

This record is certified by the undersigned to be the offical transcript of the above-entitled hearing.

/s/ DAWN T. COPELAND

OFFICIAL COURT REPORTER

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIMINALS NOS. 85-0329, 85-0330, 85-0331

UNITED STATES OF AMERICA

v.

THERESA FITZGIBBON, ET AL.

[Nov. 12, 1985]

MEMORANDUM AND ORDER

On September 11, 1985, this Court dismissed the information in the above captioned cases on the basis of vindictive prosecution. Before the Court is the government's Motion for Reconsideration. For the reasons discussed below, this motion shall be denied.

On April 22, 1985, Defendants in these combined cases were arrested with other individuals by United States Park Police. At that time, each arrestee was released with a Park Police Citation Form for "Demonstrating Without a Permit." The reactions of the arrestees to the citation varied—some paid a $50.00 fine in full satisfaction of the citation and without the necessity of a court appearance. Others ignored the citation. The defendants in these cases decided to proceed to trial. It was after this decision that the government filed a two-count misdemeanor information against only these defendants alleging the commission of two offenses: obstructing sidewalks adjacent to the White House, 36 U.S.C. 50.30; and demonstrating without a permit, 36 C.F.R. 50.19. Defendants were arraigned on these charges, each carrying a maximum penalty of six (6) months in prison and a $500.00 fine.

The government contends that its decision as to which charges to bring and in what form to bring them was a legitimate exercise of prosecutorial discretion. Although the government is correct that when it increases the charges against a defendant before trial there is no presumption of vindictiveness (unlike in post-trial situations) the Supreme Court did "not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." *United States v. Goodwin*, 457 U.S. 368, 384 (1982).

Most of the cases cited by the government in support of its Motion for Reconsideration concern situations where the government increased charges against a defendant after unsuccessful plea negotiations. For example, in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the defendant rejected a misdemeanor plea offer and was subsequently indicted on a series of felony charges. Central to the Court's finding of no vindictiveness in these cases was the Court's finding that the defendant was "fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty," the Court stated. *Id.* at 360. *See also, United States v. CFW Construction Co., Inc.*, 583 F.Supp. 197 (D.S.C. 1984) ("The defendant was in an equal bargaining position with the Government, and was free to accept or reject the proposed plea agreement." *Id.* at 208).

It is without question that the Supreme Court has accepted plea negotiation as a legitimate process. Defendants here are not attacking their opportunity to pay $50.00

in satisfaction of the original Park Citation instead of going to trial. Defendants' claim of vindictive prosecution stems from the increase in the charges against them *without warning* once they decided to exercise their right to a trial.

The government cites *United States v. Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. 1982). That case is inapposite here. In *Gallegas-Curiel*, "[t]he prosecutor . . . was motivated in part by additional information and in part by his reevaluation of the seriousness of appellant's immigration record" when he decided to bring felony charges. *Id.* at 1170 (citation omitted). The record is clear that the government in this case discovered no new information between the time of the original citation and its decision to bring another charge against only those defendants who opted to go to trial. On September 11, 1985, the Court found that it was merely Defendants' decision to go to trial which prompted the government to bring this additional charge and dismissed the case on the basis of vindictive prosecution. That decision shall stand.

For the foregoing reasons, it is by the Court this 12th day of November, 1985.

ORDERED, that the government's Motion for Reconsideration is DENIED.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
Chief Judge

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE MEYER, ET AL.

No. 85-6171

UNITED STATES OF AMERICA, APPELLANT

v.

THERESA FITZGIBBON, ET AL.

No. 85-6172

UNITED STATES OF AMERICA, APPELLANT

v.

VIRGINIA SENDERS, ET AL.

Appeals from the United States District Court
for the District of Columbia
(Criminal Nos. 85-00329-01, 85-00330-01
and 85-00331-01)

[Filed Feb. 13, 1987]

JUDGMENT

Before: WALD, *Chief Judge*, MIKVA, *Circuit Judge*, and LEIGHTON,* *Senior District Judge*.

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date ebruary 13, 1987
Opinion for the Court filed by Circuit Judge Mikva.
[*]Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX F

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA

v.

CHRISTINE MEYER, ET AL.

AND CONSOLIDATED CASES 85-6171 AND 85-6172

CR No. 85-00329-01

[Filed Apr. 30, 1987]

ORDER

Before: WALD, *Chief Judge,* MIKVA, *Circuit Judge,* and LEIGHTON,* *Senior District Judge, U.S. District Court for the Northern District of Illinois*

Upon consideration of appellant's petition for rehearing, filed March 30, 1987, it is

ORDERED, by the court, that the petition is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. Section 294(d).

APPENDIX G

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA

v.

CHRISTINE MEYER, ET AL.

AND CONSOLIDATED CASES 85-6171 AND 85-6172

CR No. 85-00329-01

[Filed Apr. 30, 1987]

ORDER

Before: WALD, *Chief Judge*, ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

Appellant's suggestion for rehearing *en banc* has been circulated to the full court. The taking of a vote thereon was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the court *en banc*, that appellant's suggestion for rehearing *en banc* is granted and it is

FURTHER ORDERED, by the court *en banc*, that the opinion and judgment of February 13, 1987 be, and the same hereby are, vacated.

A future order will govern further proceedings herein.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX H

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA

v.

CHRISTINE MEYER, ET AL.

AND CONSOLIDATED CASES 85-6171 AND 85-6172

CR No. 85-00329-01

[Filed Jul. 31, 1987]

ORDER

Before: WALD, *Chief Judge,* MIKVA, *Circuit Judge,* and LEIGHTON,* *Senior District Judge, U.S. District Court for the Northern District of Illinois*

Upon consideration of appellant's petition for rehearing, filed March 30, 1987, it is

ORDERED, by the court, that the petition is denied.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. Section 294(d).

APPENDIX I

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6169

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE MEYER, ET AL.

No. 85-6171

UNITED STATES OF AMERICA, APPELLANT

v.

THERESA FITZGIBBON

No. 85-6172

UNITED STATES OF AMERICA, APPELLANT

v.

VIRGINIA SENDERS

Criminal No. 85-00329-01, 85-00330-01, 85-00331-01

[Filed Jan. 24, 1986]

ORDER

On consideration of appellant's motion to consolidate Nos. 85-6169, 85-6171 and 85-6172, it is

ORDERED that the aforementioned motion is granted and the above captioned cases are consolidated. It is

FURTHER ORDERED that a briefing schedule is set as follows:

Appellant's brief and appendix (or Gen. Rule 17(c) transcripts)	—Feb. 28, 1986,
Appellees' brief(s)	—Mar. 31, 1986,
Appellant's reply brief, if any	—Apr. 14, 1986.

For the Court:
GEORGE A. FISHER, Clerk

By: /s/ CARMEN A. BORZA
Carmen A. Borza
Deputy Clerk
(535-3302)

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/60038